

2007 WL 7265486 (Mich.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)  
Circuit Court of Michigan.  
Wayne County

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,  
v.  
Lamont HOUSEY, Defendant.

No. 07-12098.  
2007.

**Brief: People's Motion to Admit Evidence Pursuant to Mre 803(24), or  
in the Alternative, Admit Evidence Pursuant to people V. Thompson<sup>8</sup>**

Hon C. Youngblood.

NOW COME THE PEOPLE OF THE STATE OF MICHIGAN, by and through Wayne County Prosecutor, KYML. WORTHY, and Assistant Prosecuting Attorney, JAIMIE M. POWELL, respectfully request that this Honorable Court admit the following testimony at trial pursuant to [MRE 803\(24\)](#), or in the alternative, pursuant to the proposition articulated by the Michigan Supreme Court in *People v. Thompson*, which is recognized by the Federal Courts and numerous other jurisdictions.<sup>9</sup>

***FACTS***

On June 29, 2007, Linda Moon was robbed a gunpoint in the driveway of her home located on Seminole in Detroit. The assailant took her purse, which contained her cell phone. The assailant proceeded to make phone calls from Ms. Moon's cell phone over the next few days. On July 16, 2007, Ms. Moon picked Lamont Housey out of a photo line-up.

At the preliminary exam, held August 20, 2007, the defendant was in custody. Ms. Moon testified that the person she picked out of the line-up was the person who robbed her (Lamont Housey was the person picked in the line-up). She also testified that the person present in court (who was Lamont Housey), looked like the person who robbed her, but that he looked different the day of the exam and that she was unsure. The exam was held over a month after the line-up. The court found probable cause to bind the case over for trial based on the victim's identification of Mr. Housey at the line-up, in conjunction with her testimony that Mr. Housey, in person, looked like her assailant.

The People were concerned about the issue of identification after the exam and began to look for corroborative evidence. The People obtained a copy of the victim's cell phone records for the date of the robbery and the days following in an effort to see if any of the numbers matched persons connected to Lamont Housey, the person Ms. Moon identified as the person who robbed her at gunpoint.

Interns of the **Elder Abuse** Unit, Ofc. Dion Peoples, and Prosecutor Jaimie Powell began to do reverse look-ups on land lines (this process cannot be used for cell numbers), issue subpoenas to phone companies, and called numbers in the hopes of finding out if Lamont Housey had any connection to the numbers called from the victims cell phone after the robbery.

On August 24, Jaimie Powell called a number registered to an LP Pittman who lived on Cadillac in Detroit. Mr. Pittman stated that Lamont Housey was a relative who used to live with him and that the number called (313-922-1758) was his and that he

did reside on Cadillac. Ms. Powell informed Ofc. Dion Peoples, who later took a written statement from Mr. Pittman stating the same. Mr. Pittman subsequently recanted.

Also, Jaimie Powell called (313) 915-1557 (at the time it was not known who the number belonged to, it is now known that the number is registered to a Kim Thomas). Ms. Powell asked if there was a Lamont there, once again in the hopes of someone acknowledging or denying knowing a Lamont. The person who answered said "Yes." Ms. Powell then tried to ask if it was Lamont Housey, but the person had already handed the phone over. A voice said "Hello?" Ms. Powell said, "Lamont? I want to make sure I have the right Lamont -- is this Lamont Housey?" The voice on the other end acknowledged that Ms. Powell had in fact reached Lamont Housey. Ms. Powell, shocked and surprised, immediately apologized and stated she thought she had the wrong person, hung up, and made notes in her file regarding what had just happened.

#### A) *MRE 803(24)*

In 1996, Michigan adopted *MRE 803(24)*, the residual exception to the hearsay rule (modeling it after its federal counterpart); which allows for the admission of evidence that would typically be hearsay, absent the statement having *circumstantial guarantees of trustworthiness* equivalent to those of the categorical hearsay exceptions.<sup>10</sup>

In *People v. Katt*<sup>11</sup> the court analyzed *MRE 803(24)* and announced that the proffered statement must satisfy four elements to be admissible: (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interest of justice.<sup>12</sup> The offering party must also give advance notice of intent to introduce the evidence at trial.<sup>13</sup>

In *Katt*, the statement at issue was made by a child to a child-protective-services specialist with the FIA.<sup>14</sup> The statement was not the first statement made by the child and would not have fallen into any of the categorical exceptions to hearsay. The Michigan Supreme Court analyzed the statement under the criteria set out in *MRE 803(24)* and determined that the statement had *circumstantial guarantees of trustworthiness* under the *totality of the circumstances*, and therefore was admissible under the residual exception to the hearsay rule<sup>15</sup> and the worker was allowed to testify.

The court relied on the spontaneity of the child's statement, which negated any opportunity or motive to fabricate, that the child spoke from first-hand knowledge, and that the statement was the most probative evidence available.<sup>16</sup> The court also pointed out in the opinion that corroborative evidence can be used to determine the trustworthiness of statements in criminal cases where the Confrontation Clause is not implicated.<sup>17</sup> The Confrontation Clause is not implicated in cases where the statement is that of the defendant.<sup>18</sup>

#### *Analysis: Is the Proffered Evidence Admissible under MRE 803(24)*

##### *1) Does the statement have circumstantial guarantees of trustworthiness?*

In this case, the victim's assailant stole her phone, subsequently calls were made from that phone. Lamont Housey was identified in a photo line-up. Phone records revealed a number (313) 915-1557 called from the victim's phone after the robbery. Prosecutor Jaimie Powell called that phone number and a male voice acknowledged that he was Lamont Housey.

*There are over 6 billion people in the world. The chances of that phone number having a connection to the person identified by the victim as the person who robbed her are 1 in over 6 billion. Of all the numbers and people the assailant could have*

called, the chances of a number on victim's bill having a connection to the person the victim identified as her assailant are slim to none. The odds, literally are, astronomical.

The court can also consider the spontaneity of the statement in conjunction with the above connection. The fact that the defendant lacked the time to fabricate an answer is of significance. The Michigan Supreme Court in *Katt* repeatedly stressed the importance of the spontaneity of the statement and the lack of time to fabricate an answer. The statement can also be viewed as evidence of declarant's then existing state of mind.<sup>19</sup>

Further, contact was made with an LP Pittman at (313) 922-1758, who stated that Lamont Housey was a relative through marriage who had lived with him some time ago. Jaimie Powell informed OIC Dion Peoples, who then went to Mr. Pittman's address and took a written statement from Mr. Pittman. Mr. Pittman acknowledged in writing that Lamont Housey was relative, that he knew him, and that the phone number appearing on the victim's bill was his. Mr. Pittman has now recanted. Also, intern Ashley Coneff made contact with a person who knew Lamont Housey at (313) 742-7021, but after this person was informed who Ms. Coneff was, the person refused to cooperate and hung up.

"There is no complete list of factors that establish whether a statement has equivalent guarantees of trustworthiness."<sup>20</sup> The court must look at each case and view the circumstances particular to each case in their totality.

Looking at the totality of the circumstances, the statement to Jaimie Powell has circumstantial guarantees of trustworthiness in that the defendant's statement of identification is true given the surrounding circumstances: a number on victim's cell phone just happens to be a number where Lamont Housey answers (this alone is enough to satisfy the requirement); further two other numbers have a connection to Mr. Housey (which means that the declarant acknowledging that he was Lamont Housey was not, for lack of a better term, a fluke).

## ***2) The statement tends to establish a material fact.***

The proffered statement helps to establish a material fact. In fact, it tends to establish the only fact that is of material issue in the case: that of identification.

## ***3) The statement is the most probative evidence on the fact that the offering party could party could produce through reasonable efforts.***

The third requirement "essentially creates a 'best evidence' requirement."<sup>21</sup> The residual exception should not be available where there is non-hearsay evidence on point.<sup>22</sup> Where only hearsay evidence is available, the court must analyze all of the circumstances to see if the requirements for 803(24) are met.

In this case, there is no non-hearsay evidence on point While the People will attempt to produce Mr. Pittman, the best the People can hope to do is impeach him with his written statement. However, there is no guarantee that the statement will come in substantively. The People have made great efforts to investigate this case, but unfortunately have been stumped by numerous people who have refused to talk with us and numbers that are out of service or have since changed.

Therefore, the 'best evidence' the People can produce that is reasonably available is the testimony of Jaimie Powell regarding defendant's statement due to the circumstantial guarantees of trustworthiness surrounding the statement of identification.

## ***4) The statements admission must serve the interests of justice.***

“If a statement is otherwise admissible under the residual exceptions, the interest-of-justice requirement will not preclude admission for the sole reason that is hearsay.”<sup>23</sup> If a hearsay statement has circumstantial guarantees of trustworthiness under the totality of the circumstances, the statement should not be excluded because it doesn't fit a categorical exception to the hearsay rule.

The Rules of Evidence recognize, with the residual exception and the categorical exceptions, that there are times when hearsay statements should be admitted in the search for truth.

In this case, the truth that is being sought is the identity of Linda Moon's assailant. *The defendant's acknowledgement of himself being present at a phone number called from the victim's phone after the robbery -- a robbery for which the victim identified Mr. Housey -- is evidence that should be heard by the trier of fact in the best interests of justice.* Mrs. Moon was correct the first time when she picked the defendant out of the line up and the proffered statement is the best evidence that corroborates her identification.

***B) The Identity of a Participant In a Telephone Conversation May Be Established by Circumstantial Evidence.***

If the Court is not inclined to grant the People's Motion pursuant to [MRE 803\(24\)](#), the People ask the Court to consider case law that is recognized in this jurisdiction (prior to the adoption of [MRE 803\(24\)](#)) and other jurisdictions. The aforementioned case law, which will be discussed below, stands for the proposition that the identity of a participant in a telephone conversation may be established by circumstantial evidence. The analysis is similar to that under [MRE 803\(24\)](#), but demonstrates to the court that allowing identity to be shown through circumstantial evidence has been recognized by the Michigan Supreme Court, and continues to be recognized in other jurisdictions, including federal court.

In *People v. Thompson*,<sup>24</sup> the Michigan Supreme Court recognized that there may be cases, and an existing class of cases already, in which the identity of the person with whom a witness is speaking can be satisfactorily established without authenticating the voice.<sup>25</sup> However, the facts in *Thompson* were not sufficient.

*Thompson* involved a prosecution for false swearing in an application for a marriage license in which the lower court impermissibly allowed the county clerk to testify that the defendant (whose voice the clerk could not authenticate) called and said his name was Thompson, that he said he was located at the Coast Guard Station at Muskegon and had the consent of his future bride's mother to marry her. There was testimony that no one by the name of Thompson worked at the Coast Guard Station in Muskegon. The court found there was no evidence to corroborate the identification of the defendant as the declarant on the other end of the conversation with the clerk and such evidence was not admissible, but that the admission of the testimony did not constitute reversible error.<sup>26</sup>

While the testimony in the case was considered inadmissible hearsay, the Supreme Court noted that a “class of cases existed where an inference of identity is raised, making a prima facie showing where a person is called from the telephone directory by number corresponding to his name and address and the party responds (3)27 *in other cases, ‘particular additional circumstances may suffice to complete the gap.’*”<sup>27</sup> This case is still good law and has no negative treatment from any of the courts and there are numerous federal cases, as well as cases from other jurisdictions that recognize this principle.<sup>28</sup>

In *State v. Gross*,<sup>29</sup> the court discussed how phone calls to a person at a number other than that assigned to him may be authenticated by the speaker's familiarity with unique subject matter, *or that self-identification can be combined with virtually any circumstantial evidence.*<sup>30</sup> The court articulated that the threshold of proof is low.

In our case there are additional circumstances to bridge the gap created where Jaimie Powell is unable to authenticate the defendant's voice. In our case the *defendant* was called, which led to a spontaneous acknowledgement free from adequate time

to fabricate an answer (in *Thompson* the declarant was the one who sought out the clerk and had time to think of what to say beforehand, thus making it more likely that someone else could purport to be Thompson).

Most importantly though, in our case, not only does the defendant identify himself over the phone spontaneously, the phone number was a number called after the robbery, and Linda Moon picked the defendant out of a line up over a month before the preliminary exam. All of these events happened independently of each other, which only adds to their reliability when looked at in their totality.

In conclusion, the People respectfully request that this Honorable Court grant the People's Motion to admit the testimony of Jaimie Powell pursuant to [MRE 803\(24\)](#) in the best interests of justice, or in the alternative, pursuant to the proposition articulated by the Michigan Supreme Court in *People v. Thompson*, which allows for the identity of a participant to a phone conversation be shown through circumstantial evidence.

Respectfully submitted,

<<signature>>

Jaimie Powell

Asst Prosecutor

XX/XX/

#### Footnotes

- 8 [People v. Thompson](#), 231 Mich. 256 (1925)(Michigan Supreme Court case which recognizes the position that the identity of a participant in a telephone conversation may be established by circumstantial evidence. See also [U.S. v. Pruitt](#), 702 F.2d 152 (1983), and 79 ALR 3d (1977) entitled *Identification by Circumstantial Evidence*.
- 9 *Id.*
- 10 [People v. Katt](#), 468 Mich. 272 (2003).
- 11 *Id.*
- 12 *Id.* at 279.
- 13 *Id.*
- 14 *Id.* at 274.
- 15 *Id.* at 296.
- 16 *Katt*, 468 at 295-6.
- 17 *Id.* at 292.
- 18 USCA Const. Amend 6; MCLA sec. 750.72.
- 19 See [MRE 803\(3\)](#) Then Existing Mental, Emotional, or Physical Condition.
- 20 [People v. Katt](#), 468 Mich at 291 (2003).
- 21 *Id.* at 293.
- 22 *Id.*
- 23 *d.* at 293.
- 24 [People v. Thompson](#), 231 Mich. 256 (1925).
- 25 *Id.* at 258.
- 26 *Id.* at 258.
- 27 *Id.* (citing [Thiesen v. Detroit Taxicab & Transfer Co.](#), 200 Mich. 136 (1918) and 3 Wigmore on Evidence sec. 2155).
- 28 See 79 ALR 3d sec. 19 for a list of cases that support this position. See also, [People v. Pruitt](#), 702 F.2d 152 (C.A.Mo. 1983)(trial court did not err in admitting testimony about several phone conversations Government witnesses had with defendant, despite

assertion that, since neither witness who testified about conversations with defendant was familiar with defendant's voice, foundation for authenticating telephone conversation was not properly laid, in view of fact that both witnesses recalled dialing a number on documents provided and signed by defendant and being greeted by a man who identified himself as defendant).

29     [State v. Gross, 2003 WL 23221520 \(Wash. App.\)](#).

30     *Id.*

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